

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DUANE D KRUGER,

Plaintiff,

v.

CARLOS DEL TORO,

Defendant.

Case No. 3:23-cv-05932-TMC

ORDER DENYING MOTION TO APPOINT  
COUNSEL

Before the Court is pro se Plaintiff Duane Kruger's motion to appoint counsel. Dkt. 6. For the reasons set forth below, the Court DENIES Mr. Kruger's motion.

**I. BACKGROUND**

Mr. Kruger filed this case on October 17, 2023, Dkt. 1, and this motion seeking court-appointed counsel on November 1, 2023, Dkt. 6. Mr. Kruger's complaint asserts claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 ("ADEA"). Dkt. 1-1 at 3. Mr. Kruger alleges he was unlawfully discriminated against based on age during a promotion selection process in 2020 while he was employed by the Puget Sound Naval Shipyard. *Id.* at 3–5.

Mr. Kruger notes that although he previously retained representation by Jonathan E. Trotter, Mr. Trotter was deployed to South Korea, and Mr. Kruger decided to proceed without

1 representation in part due to cost. Dkt. 6 at 5. Mr. Kruger explains that he attempted to find  
2 counsel by contacting at least 20 regional law firms, as well as national law firms and affiliates  
3 of the Washington State Office of the Attorney General, American Civil Liberties Union, Office  
4 of Military & Veteran Legal Assistance, CLEAR, and CLEAR Senior. *Id.* He further notes that  
5 “[t]he affordability issue still exists.” *Id.*

6 There is no constitutional right to appointed counsel in employment discrimination cases.  
7 *Ivey v. Bd. Of Regents of Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). In “exceptional  
8 circumstances,” the Court may appoint counsel for indigent civil litigants pursuant to 28 U.S.C.  
9 § 1915(e)(1).<sup>1</sup> *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *overruled on other*  
10 *grounds*, 154 F.3d 952 (9th Cir. 1998); *see also United States v. \$292,888.04 in U.S. Currency*,  
11 54 F.3d 564, 569 (9th Cir. 1995) (“[a]ppointment of counsel under this section is discretionary,  
12 not mandatory”).

13 As a threshold matter, although Mr. Kruger initially moved for leave to proceed *in forma*  
14 *pauperis*, Dkt. 1, he later paid the filing fee. His financial affidavit in support of this motion  
15 shows income that exceeds his monthly expenses, and assets in property and bank accounts.  
16 Dkt. 6 at 4. Although the Court recognizes the difficulty of finding affordable counsel,  
17 Mr. Kruger likely does not qualify as indigent for the purpose of appointed counsel under 28  
18 U.S.C. § 1915(e).

19 Additionally, when assessing whether there are exceptional circumstances warranting  
20 appointment of counsel, the Court must evaluate (1) “the likelihood of success on the merits” and  
21 (2) “the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the

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23 <sup>1</sup> Although Mr. Kruger applies for court-appointed counsel using the form for cases arising under Title VII of the  
24 Civil Rights Act, 42 U.S.C. §§ 2000e–2000e-17 (“Title VII”), Dkt. 6, he brings his claim for age discrimination under  
the ADEA, Dkt. 1 at 3. Title VII does not cover age discrimination. 42 U.S.C. §§ 2000e–2000e-17. Accordingly, the  
Court uses the “exceptional circumstances” standard for appointment of counsel for indigent litigants in civil cases,  
rather than the Title VII standard.

1 legal issues involved.” *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (quoting  
2 *Weygdant v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). Neither factor is dispositive and “must be  
3 viewed together before reaching a decision on request of counsel.” *Id.*

4 Exceptional circumstances may exist where the litigant has an insufficient grasp of the  
5 legal issues involved or is unable to state the factual bases of their claims. *See Agyeman v. Corr.*  
6 *Corp. of Am.*, 390 F.3d 1101, 1103–04 (9th Cir. 2004) (appointing counsel where case was  
7 unusually complex due to case law and litigant’s circumstances), *cert. denied sub nom. Gerber v.*  
8 *Agyeman*, 545 U.S. 1128 (2005). While any litigant “certainly would be better served with the  
9 assistance of counsel,” a litigant requesting counsel must show more than that benefit. *Rand*, 113  
10 F.3d at 1525. They must demonstrate that they are unable to articulate their position due to the  
11 complexity of claims. *Id.*

12 The Court’s resources for appointing counsel are limited and must be reserved for those  
13 cases meeting the standard discussed above. While the Court appreciates Mr. Kruger’s  
14 application for counsel and the information he has provided, his case does not meet the standard  
15 for appointment of counsel for the following reasons:

16 First, the Court does not possess sufficient information to evaluate the likelihood of  
17 success of Mr. Kruger’s case on the merits. Mr. Kruger’s complaint alleges that Defendant  
18 unlawfully discriminated him based on age, but he has provided few factual allegations  
19 supporting his claims. *See generally* Dkt. 1, 6. At this early stage of the litigation, the Court  
20 cannot determine the merits of Mr. Kruger’s claims.

21 Second, Mr. Kruger has not identified circumstances rendering his case of complexity  
22 sufficient to warrant appointment of counsel. Mr. Kruger has so far demonstrated he is able to  
23 file pleadings and motions in the case. Additionally, the contents of his filings do not indicate  
24 that the legal issues involved will be particularly complex. *See Wilborn*, 789 F.2d at 1331. While


1 Mr. Kruger may certainly benefit from the assistance of legal counsel as a pro se litigant, he has  
2 not shown that this case will reach a degree of complexity sufficient to require designation of  
3 counsel. *See id.*; *Agyeman*, 390 F.3d at 1103–04; *Rand*, 113 F.3d at 1525.

## 4 II. CONCLUSION

5 Future motion practice may allow the Court to better evaluate the merits of Mr. Kruger's  
6 claims, but this case does not currently present extraordinary circumstances warranting the  
7 appointment of counsel. The Court therefore DENIES his motion to appoint counsel. This does  
8 not prevent Mr. Kruger from bringing another motion for appointed counsel at a later stage of the  
9 case should his financial condition or other circumstances change. The Court encourages  
10 Mr. Kruger to review this District's resources for pro se litigants, available at  
11 <https://www.wawd.uscourts.gov/representing-yourself-pro-se>, including the Federal Bar  
12 Association's civil rights legal clinic, with more information available at  
13 <https://www.kcba.org/?pg=Neighborhood-Legal-Clinics>.

14 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
15 to any party appearing pro se at said party's last known address.

16 Dated this 21st day of November, 2023.

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19 Tiffany M. Cartwright  
20 United States District Court Judge  
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